

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL

In the Matter of)

Telephone Number Portability)

CC Docket No. 95-116
RM 8535

RECEIVED

OCT 10 1996

Federal Communications Commission
Office of Secretary

DOCKET FILE COPY ORIGINAL

REPLY OF
AMERICAN COMMUNICATIONS SERVICES, INC.

American Communications Services, Inc. ("ACSI"), by its attorneys, and pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, hereby replies to the oppositions and comments on its Petition for Partial Reconsideration¹ of the FCC's First Report and Order on telephone number portability.²

In its Petition, ACSI requested reconsideration of the Commission's Rules to provide for a true-up of amounts paid by a new entrant to incumbent local exchange carriers ("ILECs") for currently available number portability from the effective date of the Telecommunications Act of 1996 ("1996 Act")³ through the date a state-approved cost-recovery mechanism for interim number portability goes into effect. In addition, ACSI asked the FCC to accelerate the long-term service provider number portability deployment dates for the top 100 markets, as detailed in Attachment A to the ACSI Petition, to ensure

¹ Petition for Partial Reconsideration filed by ACSI, CC Docket No. 95-116, dated August 26, 1996 ("ACSI Petition").

² Telephone Number Portability, 11 F.C.C. Rcd 8352 (1996) ("TNP Order").

³ Where a new entrant begins to take interim number portability after the effective date of the 1996 Act, the true-up period should begin on the date interim portability was first taken by that new entrant.

No. of Copies rec'd 11
List A B C D E

implementation more compatible with a wide variety of new entrants' potential strategic business plans. In the alternative, ACSI requested that, beginning July 1, 1997, carriers be able to make *bona fide* requests for long-term portability at least six months in advance of when portability is needed. The ILEC involved should be required to honor the request unless it demonstrates with substantial, credible evidence that it is technically unable to do so. Adoption of the modifications ACSI proposed will promote the entry of new local competitors and increase the service choices of consumers at lower prices. As explained below, none of the oppositions to or comments on ACSI's position undermines the soundness of ACSI's proposed modifications.

I. SINCE FEBRUARY 8, 1996, THE 1996 ACT HAS REQUIRED COMPETITIVELY NEUTRAL RECOVERY OF THE COSTS OF TELEPHONE NUMBER PORTABILITY.

Section 251(e)(2) of the Communications Act of 1934, as amended by the 1996 Act, provides that "[t]he cost of establishing . . . number portability shall be borne by all telecommunications carriers on a competitively neutral basis . . ."⁴ In the *TNP Order*, the Commission concluded that this provision applied to both interim and long-term number portability.⁵ Accordingly, the FCC adopted guidelines that ILECs and State commissions must follow to ensure that the costs of interim number portability are recovered on a competitively neutral basis.⁶ These rules took effect on August 26, 1996.⁷

⁴ 47 U.S.C. § 241(e)(2).

⁵ *TNP Order*, at 8409.

⁶ *See* 47 C.F.R. §§ 52.9(a)(b).

⁷ 61 Fed. Reg. 38605 (July 25, 1996).

ACSI, concerned that a new entrant be guaranteed the benefits of Section 251(e)(2) competitive neutrality that Congress intended both before and after a State commission reviews and approves an interim number portability cost recovery mechanism, proposed that there be a true-up of amounts paid for number portability prior to State commission approval, to the extent such amounts exceed what would have been paid under the State approved plan had it been in effect. The Association for Local Telecommunications Services ("ALTS")⁸ agreed with ACSI's proposed modifications, as did Teleport Communications Group, Inc. ("TCG"), if only indirectly.⁹

However, several ILECs challenge ACSI's proposal, contesting the applicability of the statutory provisions requiring competitive neutrality and the FCC's rulemaking authority to cost recovery for interim number portability.¹⁰ Others contend that ACSI is requesting the FCC to engage in impermissible retroactive rulemaking.¹¹ Neither of these claims has merit.

First, as AT&T Corp. explains in its Opposition to BellSouth's petition for reconsideration, the contention that the FCC has no jurisdiction over interim number portability and that the statutory requirement of competitively neutral cost recovery applies

⁸ Response of ALTS, CC Docket No. 95-116, dated Sept. 27, 1996, at 6.

⁹ Reply of TCG, CC Docket No. 95-116, dated Oct. 7, 1996, at 1 (supports ALTS Response).

¹⁰ See Bell Atlantic's Response, CC Docket No. 95-116, dated Sept. 17, 1996, at 1; BellSouth Opposition, CC Docket No. 95-116, dated Sept. 27, 1996, at 1-2.

¹¹ See NYNEX Opposition and Comments, CC Docket No. 95-116, dated Sept. 17, 1996, at 6; BellSouth Opposition at 2.

only to long term number portability is "baseless":

Section 251(b) requires that carriers "provide, *to the extent technically feasible*, number portability in accordance with the requirements of the Commission," and Section 251(e)(2) provides that the "cost of . . . number portability shall be borne by all carriers on a competitively neutral basis as determined by the Commission." Because RCF, DID, and like arrangements have been determined to be the only forms of number portability that are technically feasible today, the Commission not only had "jurisdiction" to establish their requirements, but also had the statutory duty to establish competitively neutral means of imposing their costs on "all carriers."¹²

Congress's grant of authority to the Commission over interim number portability is consistent with sound public policy. Only if currently available methods of number portability are implemented on a competitively neutral basis, as envisioned by the *TNP Order*, can the emergence of local competition be supported, a principal objective of the 1996 Act.¹³ The need for competitively neutral cost recovery for interim number portability is especially severe given that the FCC's current schedule does not require long term number portability in many of the top 100 markets for two or more years (ignoring any potential waivers of the schedule deadlines). Further, markets below the top 100, a number of which ACSI already has plans to enter in the near term, cannot be guaranteed long-term number portability any earlier than July 1, 1999, under the FCC's current schedule, over thirty

¹² *Opposition of AT&T*, CC Docket No. 95-116, dated Sept. 27, 1996, at 22 (emphasis in original). *Accord* *Opposition of MCI Telecommunications Corporation and MCI Metro*, CC Docket No. 95-116, dated Sept. 27, 1996, at 3-4; *Comments of Time Warner Communications Holdings, Inc.*, CC Docket No. 95-116, dated Sept. 27, 1996, at 10-13.

¹³ Moreover, Section 271(c)'s reference to interim number portability as part of the RBOC competitive checklist expressly recognizes that long-term number portability will not be available immediately. In light of the overall thrust of the 1996 Act in promoting local competition, it is incongruous to conclude, as a result of Section 271(c)'s reference to interim portability, that Section 251(e)'s requirements of competitive neutrality *excludes* interim portability, as several ILECs contend. It is absurd to think that interim number portability for which costs are recovered on a basis that is *not* competitively neutral could satisfy the competitive checklist.

months away. By contrast, most of ACSI's pending interconnection arbitration requests must be resolved before the end of 1996, and the State commission agreement approval procedures should be completed very shortly thereafter.

Second, by seeking a true up of new entrants' contributions to the recovery of costs for interim number portability made prior to State approval of a cost-recovery mechanism, ACSI is not asking the FCC to engage in retroactive rulemaking. Rather, the statutory provision obligating of all carriers to contribute to number portability cost recovery on a competitively neutral basis became effective on February 8, 1996. ACSI is merely seeking to have the FCC give that pre-existing requirement some teeth, which will be particularly crucial in the pivotal early phases of the introduction of local competition. Absent a true-up, the promise of competitive neutrality could ring very hollow, as new entrants may be hampered (and the emergence of local competition thwarted) by excessive nonrecurring and recurring charges until a compliant State-approved cost recovery plan takes effect. At the very least, the FCC must (and can) provide for a true up from the effective date of the *TNP Order* -- August 26, 1996 -- through the date that a State-approved cost recovery program takes effect. Any true-up would merely represent a correction of circumstances in cases where the competitive-neutrality provisions of Section 251(e)(2) were not met prior to State approval of a plan.

II. ACSI'S PROPOSED LONG TERM PORTABILITY IMPLEMENTATION SCHEDULE CHANGES ARE IN THE PUBLIC INTEREST AND WILL NOT BE BURDENSOME TO THE ILECS.

In its Petition, ACSI proposed changes to the implementation schedule designed to ensure that the introduction of long term number portability is not delayed any more than necessary to smaller markets. Specifically, ACSI proposed a slight acceleration of the schedule in some regions of the country so that all major, *i.e.*, RBOC, regions be required to introduce long-term number portability according to roughly the same schedule as a function of population served. ACSI also explained that the schedule for those markets in the top 100 served by non-RBOC ILECs should also be accelerated. In addition, as a general matter, ACSI required that *bona fide* requests for MSAs below the top 100 markets be accepted beginning July 1, 1998, not January 1, 1999 -- in other words, six months earlier than provided for in the *TNP Order*. In this way, implementation of *bona fide* requests will begin upon or immediately prior to the completion of the top 100 markets rather than six months later, *i.e.*, January 31 as opposed to July 1, 1999.¹⁴

A number of other parties recognize the procompetitive need to accelerate the deployment schedule for long-term number portability in smaller markets or to allow local competitors to make *bone fide* requests for markets outside the top 100 more quickly than

¹⁴ In the alternative, ACSI petitioned the Commission to amend its rules to permit carriers with an operational network in a top-100 MSA and authority to provide local exchange services to request long-term number portability from the appropriate ILEC on or after July 1, 1997. Such requests should specifically identify the geographic area covered by the request and a date six or more months in the future when the new entrant requires long-term portability. If the ILEC involved opposes the request, it would have the burden of proving -- through substantial, credible evidence -- the technical basis for any contention that it cannot meet such a request, and propose an alternative date for deployment not more than three months later than the date identified by the requesting carrier. In addition, under this alternative, carriers with operational networks in markets below the top 100 MSAs should be permitted to make a *bone fide* request for long-term number portability in such markets after January 1, 1998.

contemplated in the *TNP Order*. Several of these parties explicitly support ACSI's proposals.¹⁵ Others offer more aggressive proposals by asking the FCC to accelerate the dates that *bona fide* requests can be made by more than six months.¹⁶ Another party, USTA, proposes that regulators be given the flexibility to move a market up on the FCC schedule if new carriers are providing competitive local services in that market, and therefore demonstrating the need for long-term portability implementation.¹⁷

What is common to each of these parties' positions is that the implementation of long run number portability should reflect and track, to the extent possible, the actual development of local competition. These filings underscore the reality that new entrants, in many cases, such as ACSI's, will be targeting not the very largest markets first (say the top 25 or 50), but smaller ones, including those outside the top 100. The FCC's schedule, as adopted in the *TNP Order*, on the other hand, presupposes a simple and monolithic business strategy, specifically that competition will emerge more quickly in any given larger market than in any given smaller market. Further, the Commission's schedule effectively ensures that all 100 of the top markets will be deployed -- absent the grant of waivers -- before any smaller markets are implemented.

¹⁵ See, e.g., Comments of Intelcom Group (U.S.A.), Inc., CC Docket No. 95-116, dated Sept. 27, 1996, at 3-5 (general support of ACSI's proposed schedule modifications); ALTS Response at 6 (ILECs should not be allowed to defer implementation until the scheduled date where the practical ability to provide long term portability exists prior to that date).

¹⁶ See, e.g., Petition of KMC Telecom Inc., CC Docket No. 95-116, dated Aug. 23, 1996, at 5-10. Petition of Nextlink Communications L.L.C., CC Docket No. 95-116, dated Aug. 26, 1996, at 5-7.

¹⁷ Comments of USTA, CC Docket No. 95-116, dated Sept. 27, 1996, at 5.

Because competition will not develop in so predictable a pattern, ACSI filed its Petition in an effort to accelerate the dates that smaller markets will see long run portability installed. As the ACSI Petition makes clear, ACSI does not propose that any ILEC to take on a greater burden than the FCC proposed for the two RBOCs with the largest implementation burden, Bell Atlantic and Pacific Telesis.¹⁸

Some ILECs oppose the proposals of ACSI and others to modify the schedule to reflect the fact that local competition may develop more quickly in some smaller markets faster than it does in certain larger markets. The only reasons these parties give is that -- predictably -- their implementation burden is already too large, and purportedly impossible to meet.¹⁹

In response, ACSI submits that the FCC should treat such opposition with a great deal of suspicion. Obviously, entrenched ILECs have the most to lose from the emergence of local competition and, it follows, long-term number portability. Indeed, not only do many of these parties oppose the modest acceleration requested by ACSI, but they seek a lengthening of the deployment schedule and more lenient and specific standards by which they can obtain a waiver from schedule compliance.

ACSI submits that the FCC should not, under any circumstances, modify its rules to extend the schedule or make it easier to obtain a waiver of the long run number portability schedule. Instead, as many parties argue, the Commission should hold an ILEC with

¹⁸ Compare ACSI Petition Attachment A to *TNP Order*, Appendix F.

¹⁹ See, e.g., BellSouth Opposition at 6; NYNEX Opposition at 6; Opposition of Sprint Corporation, CC Docket No. 95-116, dated Sept. 27, 1996 at 11.

deployment obligations to a very high standard of proof if it seeks a waiver.²⁰ The standard set forth in the *TNP Order* -- substantial, credible evidence of extraordinary circumstances beyond the ILEC's control -- is adequate and appropriate.²¹

Moreover, as AT&T explains so clearly in its Opposition, the ILECs will be able to meet the schedule set forth in the *TNP Order*.²² Accordingly, it is not unreasonable to modify the schedule, as ACSI requests, in such a way that imposes no greater a burden on any ILEC than that which the FCC has already imposed on Bell Atlantic and PacTel. This is all ACSI asks. But, by granting the ACSI Petition, the FCC will take an important step toward ensuring that local competition is introduced to all markets, small as well as large, more expeditiously. The requested modifications would require all RBOCs to implement permanent number portability at an approximately equal pace and thus minimize the discrepancies between one region and another. The results will be a more rapid emergence of local competition for all areas of the nation, consistent with the forward-looking vision of the Congress underlying the 1996 Act.

²⁰ *E.g.*, Comments of Time Warner at 6-9. Furthermore, ACSI joins with those parties that oppose the ILECs' efforts on reconsideration to find that Query on Release, or QOR, meets the FCC's long run number portability performance criteria. *See, e.g.*, AT&T Opposition at 7-20.

²¹ *TNP Order* at 8397.

²² *See, e.g.*, AT&T Opposition at 20-21.

III. CONCLUSION


In conclusion, for the reasons set forth herein as well as those laid out in the ACSI Petition, the FCC should modify its telephone number portability rules as ACSI urged in its Petition.

Respectfully submitted,

**AMERICAN COMMUNICATIONS
SERVICES, INC.**

Riley M. Murphy
James C. Falvey
AMERICAN COMMUNICATIONS
SERVICES, INC.
131 National Business Parkway
Suite 100
Annapolis Junction, MD 20701

By: _____


Brad E. Mutschelknaus
Edward A. Yorkgitis, Jr.
KELLEY DRYE & WARREN, LLP
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036

Its Attorneys

October 10, 1996

CERTIFICATE OF SERVICE

I, Edward A. Yorkgitis, Jr., Esq., hereby certify that copies of the foregoing document were forwarded via U.S. Mail First Class delivery, on this 10th day of October, 1996 to:

Mr. Kent Nilsson, Chief
Network Service Division
Common Carrier Bureau
Federal Communications Commission
2000 L Street, N.W., Room 253
Washington, D.C. 20554

International Transcription Service
2100 M Street, Suite 140
Washington, D.C. 20037

Competitive Pricing Division
Common Carrier Bureau
191 M Street, N.W., Room 518
Washington, D.C. 20554

Daniel M. Waggoner, Esq.
Davis Wright Tremaine
2600 Century Square
1501 Fourth Ave.
Seattle, WA 98101-1688

Richard J. Metzger, Esq.
Association for Local Telecommunications
Services
1200 19th Street, NW, Suite 560
Washington, D.C. 20036

Brian Conboy, Esq.
Sue D. Blumenfeld, Esq.
Thomas Jones, Esq.
Willkie Farr & Gallagher
1155 21st Street, N.W.
Washington, D.C. 20036-3302

Jay C. Keithley, Esq.
Leon M. Kestenbaum, Esq.
Norina Moy, Esq.
Sprint Corp.
1850 M Street, N.W., Suite 1110
Washington, D.C. 20036

John L. Bartlett
Angela N. Watkins
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Caressa D. Bennet, Esq.
Gregory Whiteaker, Esq.
Bennet & Bennet, PLLC
1019 19th Street, N.W.
Washington, D.C. 20036

Stephen R. Effros, President
Mr. James H. Ewalt, EVP
Cable Telecommunications Assn.
P.O. Box 1005
3950 Chain Bridge Road
Fairfax, VA 22030

John M. Goodman, Esq.
Bell Atlantic Telephone Company
1133 20th Street, NW
Washington, D.C. 20036

Glenn S. Rabin, Esq.
Alltel Corporation
655 15th Street, NW, Suite 220
Washington, D.C. 20005

Michael F. Altschul, Esq.
Mr. Randall S. Coleman, VP
Cellular Telecommunications Industry
Assn.
1250 Connecticut Ave., NW, Suite 200
Washington, D.C. 20036

Mary McDermott, Esq.
Linda Kent, Esq.
Charles D. Cosson, Esq. and Keith
Townsend, Esq.
USTA
1401 H Street, NW, Suite 600
Washington, D.C. 20005-2136

M. Robert Sutherland, Esq.
Theodore R. Kingsley, Esq.
BellSouth Corp. & BellSouth Telcomms,
Inc.
1155 Peachtree Street, NE, Suite 1700
Atlanta, GA 30309

Marlin D. Ard, Esq.
Nancy C. Woolf, Esq.
Pacific Telesis Group
140 New Montgomery Street
San Francisco, CA 94105

Margaret E. Garber, Esq.
Pacific Telesis Group
1275 Pennsylvania Ave., NW
Washington, D.C. 20004

Mark C. Rosenblum, Esq.
Roy E. Hoffinger, Esq.
Clifford K. Williams, Esq.
AT&T
295 N. Maple Ave., Rm. 17-435313
Basking Ridge, NJ 07920

Christopher J. Wilson, Esq.
Frost & Jacobs
2500 PNC Center
201 East Fifth Street
Cincinnati, OH 45202

Thomas E. Taylor, Esq.
Sr. Vice President-General Counsel
Cincinnati Bell Telephone Company
201 East Fourth Street, 6th Floor
Cincinnati, OH 45202

Larry A. Blosser, Esq.
Donald J. Elardo, Esq.
MCI Telecommunications Corp.
1801 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Richard L. Cys, Esq.
Davis Wright Tremaine
1155 Connecticut Ave., N.W, Suite 700
Washington, D.C. 20036

Albert H. Kramer, Esq.
Robert F. Aldrich, Esq.
Christopher T. McGowan
Dickstein, Shapiro & Morin, L.L.P.
2101 L Street, N.W.
Washington, D.C. 20037-1526

Woody Traylor
MCI Telecommunications Corp.
2250 Lakeside Blvd.
Richardson, TX 75082

Elizabeth G. Kistner
EGK Consulting
3 Spoede Ridge Lane
St. Louis, Missouri 63141

Stephen P. Bowen, Esq.
Blemenfeld & Cohen
101 California St., 42nd Floor
San Francisco, CA 94111

Ms. Wanda M. Harris
Competitive Pricing Division
Common Carrier Bureau
1919 M Street, N.W., Rm. 518
Washington, D.C. 20554


David Cosson
NTCA
2626 Pennsylvania Ave., N.W.
Washington, D.C. 20037

Lisa M. Zaina
OPASTCO
21 DuPont Circle, N.W.
Washington, D.C. 20036

Campbell L. Ayling, Esq.
111 Westchester Ave.
White Plains, NY 10604

B.J. Peters, Esq.
140 New Montgomery St.
San Francisco, CA 94105

Theresa Marrero, Esq.
Senior Regulatory Counsel
Teleport Communications Group, Inc.
Two Teleport Drive, Suite 300
Staten Island, NY 10311



Edward A. Yorkgitis, Jr.
KELLEY DRYE & WARREN, LLP
1200 19th Street, N.W, Suite 500
Washington, D.C. 20036
(202) 955-9600